

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Revision of Part 22 and Part 90 of the
Commission's Rules to Facilitate Future
Development of Paging Systems

Implementation of Section 309(j)
of the Communications Act --
Competitive Bidding

TO: The Commission

WT Docket No. 96-18

PP Docket No. 93-253

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**REPLY COMMENTS OF AMERITECH MOBILE SERVICES, INC.
ON INTERIM LICENSING PROPOSAL**

Ameritech Mobile Services, Inc. (Ameritech) hereby submits its reply comments on the interim licensing proposal set forth in the Commission's February 9, 1996 Notice of Proposal Rulemaking (NPRM) in the above-captioned matter. As discussed below, the industry has overwhelmingly opposed the freeze on acceptance of applications during the pendency of this rulemaking, in its present form. While various proposals have been put forth as alternatives to the freeze, nearly all advocate allowing incumbent licensees to make reasonable expansions and modifications to their existing systems, which Ameritech supports. The industry also opposes the adoption of a new substantive 900 MHz interference protection formula, either as an interim measure or as a permanent standard. Indeed, the comments demonstrate that the new standard would appear to be improper under the Commission's statutory auction authority.

I. The Industry Overwhelmingly Opposes the Filing Freeze in Its Present Form.

Virtually all of the comments are directed to the freeze which the Commission has imposed on the filing of new paging applications, and the processing of applications which have not yet achieved cut-off status. Nearly all of the comments on this point oppose the freeze in its present form.¹ Ameritech pointed out in its comments that incumbent licensees must be able to expand and modify their existing systems; otherwise, the harm from the freeze would greatly outweigh any benefit to be realized from market area licensing. A number of commentors agree with this position. See, e.g., Comments of Pacific Bell, at pp. 2-3; Comments of Page Telecommunications, Inc. at pp. 3-4; Comments of Source One Wireless, Inc. at pp. 3-4.

One commentor elaborates on the balancing test cited by Ameritech, pointing out that two of the key elements in this balance are the reliance of existing carriers on the former rule and the burden on them created by the new rule. Comments of John D. Pellegrin at pp. 4-5; See Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972). Ameritech agrees with this commentor that the freeze unduly punishes carriers who have expended significant resources in preparing and filing applications which will be held in abeyance and eventually dismissed under the current freeze. However, the reliance of these carriers extends beyond the cost of filing applications. These entities have expended tremendous resources (collectively hundreds of millions of dollars) planning and implementing their paging systems based on the current rules. The freeze prevents these entities from completing

¹ One commentor, TSR Paging, Inc., concurs with the Commission's conclusion that a freeze is needed, but notes that a freeze of more than a few months will have adverse consequences. Comments of TSR Paging, Inc. at p. 5.

the process of filling in the gaps in their coverage and extending this coverage to those areas requested by their customers, thereby stranding the investment they have already made in equipment, site leases, etc.

Ameritech also agrees with those commentators who point out that the freeze gives an undue advantage to nationwide paging licensees. See, e.g., Comments of Page Telecommunications, Inc. at p. 7; Emergency Petition for Immediate Withdrawal of Freeze of the Coalition for a Competitive Paging Industry at p. 15. Ameritech's regional paging service is competing directly with nationwide paging carriers, since these carriers offer local and regional service options. While nationwide carriers can apply to add sites without restriction, Ameritech will be unable to respond to the marketplace for more than a year. This artificial restraint on competition defeats the asserted pro-competition goal of the market area licensing scheme. Moreover, it is arbitrary and capricious for the Commission to treat similarly situated applicants differently. See Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235 (D.C. Cir. 1985). The public interest would be served not by stifling the ability of nationwide carriers to expand coverage, but instead by lifting the restriction on all other paging carriers.

Many commentators oppose the freeze altogether. Among them are commentators who point out that a freeze is designed primarily to preserve the value of the remaining spectrum, and thereby enhance auction revenues, in violation of Sections 309(j)(7)(A) and (B) of the Communications Act of 1934, as amended (the Act).² Because the paging spectrum is so heavily licensed, and the Commission has acknowledged that there are

² Sections 309(j)(7)(A) and (B) were created by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI §6002(b)(2)(A), (B), 107 Stat. 312. The relevant portion of this legislation prohibits the Commission from making the allocations of spectrum for auction, and designing regulations based "on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection."

few, if any, opportunities for new entrants, the primary purpose of the freeze would be to preserve the so-called "white space" and thereby boost the anticipated auction revenues. See Comments of ProNet Inc. at p. 17; Comments of John D. Pellegrin at p. 6. Given the stated purpose of this rulemaking to transition to wide-area licensing (NPRM at paragraph 1), and the lack of available spectrum for new wide-area systems, Ameritech must agree that the freeze is highly suspect under Section 307(j)(7) of the Act.

Ameritech also pointed out in its comments (at pp. 2-4) that the retroactive nature of the freeze was improper under relevant precedent, and was adverse to the public interest. The comments reflect near unanimous agreement within the industry on this point. See, e.g., Comments of John D. Pellegrin at p. 4; Comments of the Paging Coalition at pp. 7-8; Comments of Mobilefone Service, Inc. at pp. 4-5.

There is a range of opinion concerning how the freeze could be modified to safeguard the public interest, assuming arguendo that the freeze is not statutorily prohibited as discussed above. Ameritech does not oppose the lifting of the freeze altogether, and certainly agrees with those commentators who advocate the continued ability of incumbent licensees to expand and modify their systems in response to customer demand and other constantly changing circumstances. See, e.g., Comments of Pacific Bell at p. 2-3 (urging the Commission to allow incumbents to add sites which are "contiguous" to their existing system); Comments of Page Telecommunications L.L.C. at pp. 4-5 (the Commission should allow incumbents to add transmitters which overlap a grandfathered site's interference contour by at least 50%); Comments of ProNet Inc. at p. 8 (urging the Commission to allow additional sites which are within 40 miles of authorized stations); Comments of PageMart, Inc. at p. 4 (the Commission

should allow additional sites where transmitters are within existing service area contour even though new service area will extend beyond contour).

The comments of Brown and Schwaninger similarly support expansion rights for incumbents, where the proposed transmitter would not increase the authorized service area contour by more than 50 percent. Id. at p. 3. However, Brown and Schwaninger would limit this expansion right to systems which are no larger than six transmitters. While this size restriction is proffered as a small business protection, many if not most small businesses operate systems which include more than six transmitters. Indeed, six transmitters would not be adequate to provide coverage to any appreciable city or town, given the need for overlapping service areas to ensure building penetration, and extension of service to related roadways and "bedroom" communities. Moreover, the purpose of expansion rights for incumbents is to ensure adequate service to the public, not to punish a carrier for its success (and thus its growth). Large and small carriers alike serve small business customers who have ever-changing coverage needs. The freeze should not prevent existing carriers from responding to those needs.

Two commentators agree with the Commission's proposed secondary site option. See Comments of American Paging at p. 3; North State Communications, Inc. at p. 4. Ameritech does not oppose the suggestion of North State that secondary transmitter sites should gain primary status if the market area licensee fails to construct, or otherwise loses its license. However, Ameritech reiterates that secondary status is not a viable option for incumbents who are expanding coverage in response to customer demand. Such incumbents must be given a reasonable area within which to expand, and these carriers cannot risk implementing the expanded service (at great cost) on a secondary basis, only to be forced off the air by the market area licensee. See Ameritech

Comments at pp. 7-9; Comments of PageMart, Inc. at pp. 3-4; Comments of Consolidated Communications Mobile Services, Inc. at p. 4; Comments of Nationwide Paging, Inc., et al, at p. 5-6. Perhaps secondary status would be appropriate for proposed sites which are far removed from, and unrelated to, the incumbent's existing coverage. However, given the wide-area coverage of most paging systems, few such instances will arise.

II. The Industry Opposes Adoption of the Proposed 900 MHz Interference Contour Formula, Even on an Interim Basis.

Ameritech's comments (at p. 10) requested the Commission to clarify that it did not intend to immediately and retroactively adopt the new interference contour formula set forth in paragraph 52 of the NPRM, despite the ambiguous wording of paragraph 140 (and in particular, footnote 271). The Commission's staff has subsequently clarified that paragraph 140 was intended only to create an additional option for licensees to install internal sites under the new formula, and was not intended to change the protection standard for transmitters which were being added in accordance with the existing rules. See, e.g., March 6, 1996 Ex Parte Letter of John A. Prendergast, Esq., to David Furth, Acting Chief of Commercial Wireless Division, WT Docket No. 96-18.³ However, the staff has also indicated that the new contour formula could be adopted as part of the interim licensing standard. Id. Ameritech reiterates its position that the new formula is not appropriate for 900 MHz interference protection, as either an interim or permanent standard. The commentators that focused on this issue have agreed with Ameritech on this point. See, e.g., Comments of ProNet Inc. at pp. 4-6; Comments of the Paging

³ Because this clarification is currently in the form of informal staff advice, Ameritech recommends that it be reiterated in a formal Commission order or public notice.

Coalition at pp. 18-19; Comments of Source One Wireless at pp. 4-5; Comments of American Paging, Inc. at pp. 3-4; Emergency Petition for Immediate Withdrawal of Freeze of the Coalition for a Competitive Paging Industry at pp. 25-27.⁴

900 MHz systems have been planned pursuant to the existing co-channel separation standards, and Ameritech believes that these standards are an appropriate measure of the interference protection needed in the 900 MHz band. If the new formula is applied to pending 900 MHz applications, as well as future sites which were on the drawing board but not yet in application form, the reasonable buildout of existing systems in response to the marketplace will be frustrated. This result would clearly harm the public interest. To the extent that it would retroactively apply to applications already on file, the new formula would fail the balancing test for retroactivity discussed above, given the harm caused to existing carriers, and their strong reliance on the present standard. See Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB, 466 F.2d at 390.

Moreover, the interim reduction of 900 MHz interference protection would appear to suffer the same statutory infirmity as the freeze itself. The reduction of such protection will not benefit existing carriers or their customers. Instead, it will only result in a disruption of paging services. The only apparent reason for the revised interference contour calculation would be to create more "white space," thereby increasing potential

⁴ The fact that more commentors did not address this issue can be attributed to the ambiguous wording of paragraph 140, and footnote 271. Ameritech believes that many commentors simply did not realize the possibility that the new contour formula could be imposed as an interim standard. The courts have previously expressed concern when a significant policy change has been ambiguously presented to the public, especially in the form of a footnote. See, e.g., McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993). Accordingly, the Commission should clarify its proposal, and allow further comment as needed to develop a complete record.

auction revenues. As ProNet Inc. points out, this purpose contravenes Sections 309(j)(7)(A) and (B) of the Act. "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, ..." Arent v. Shalala, 70 F.3d 610, 616 (D.C. Cir. 1995) [quoting Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)]. Since Congress has expressly prohibited the Commission from basing its spectrum allocations and licensing regulations on the potential for auction revenues, adoption of the new contour formula would be arbitrary and capricious.

CONCLUSION

In light of the foregoing, the Commission should either lift the freeze in its entirety, or modify the freeze to protect existing paging services in the manner described in Ameritech's comments. While the commentators propose various options which would protect existing systems, nearly all of them provide for reasonable expansion rights, and the Commission should be able to fashion an acceptable standard from these suggestions. The Commission may want to request that the industry form a task force to determine if a consensus can be reached on interim expansion rights, in an expedited manner. The Commission should also retain the existing interference protection standards for 900 MHz operations, for purposes of processing both pending applications and

future expansion proposals which may be allowed upon elimination or modification of the freeze.

Respectfully submitted,

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